

P. Ahearn



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Big Valley Lumber Co.
File: B-236982
Date: December 19, 1989

DIGEST

Protest that agency violated regulatory prohibition against consideration of bid on timber resale from bidder who failed to complete the original contract is denied where agency determined allowing firm to compete was in the public interest, the exception provided for in the regulation.

DECISION

Big Valley Lumber Co., protests the award of a contract to Almanor Forest Products, under the Miller Timber Resale, conducted by the Forest Service, United States Department of Agriculture.^{1/} The sale was located within the Big Valley Federal Sustained-Yield Unit, Modoc National Forest, California.

We deny the protest.

The award here is the result of the Forest Service's second effort to complete the Miller Timber Sale. Almanor was the highest bidder on the original sale, and the agency made award to the firm on June 1, 1989, by issuing a contract for execution. However, the firm failed to execute and return the contract within 30 days of contract award, which the agency deemed a repudiation. Thereafter, the Forest Service offered the sale to Big Valley, the only other qualified bidder, by letter dated July 7. The letter informed Big Valley that if it rejected the sale, the Forest Service would readvertise the sale under the same conditions as the original offering, and that all purchasers qualifying under the Policy Statement for the Big Valley Federal Sustained

^{1/} In accordance with 4 C.F.R. § 21.11 (1989), the Forest Service has agreed to have its protests concerning timber sales decided by our Office. See Big Valley Lumber Co., B-221181, B-221182, Apr. 2, 1986, 86-1 CPD ¶ 313.

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Yield Unit would be allowed to bid on the resale. The resale was advertised publicly in August, with a bid opening date of September 1. Almanor was the highest bidder on the resale at bid opening and the firm's offer was accepted for award.

The protester alleges that allowing Almanor to bid on the Miller Timber Resale violated timber sale contract regulations at 36 C.F.R. § 223.86(a) (1988). Those provisions, entitled "Bid Restriction on Resale of Noncompleted Contract," provide as follows:

"(a) Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract:

- (1) Because of termination for purchaser's breach; or
- (2) through failure to cut designated timber on portions of the sale area by the termination date, unless acceptance of such bid is determined to be in the public interest."

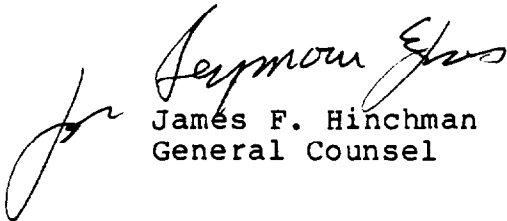
The Forest Service, however, considered Almanor's failure to execute the contract to be a "repudiation" of the contract, not a breach within the meaning of the regulation, and maintains that it therefore was not prohibited from allowing Almanor to bid on the resale. In any case, the Forest Service points out, it considered acceptance of Almanor's bid to be in the public interest.^{2/}

^{2/} The agency contends that the protest was untimely filed more than 10 days from the last arguable date the basis of the protest should have been known, the date of bid opening, September 1. However, as the protest was filed on September 18, the tenth working day of the federal government (September 4 was a federal holiday), after September 1, the protest was timely filed. While the agency also argues that the protester should have been aware of the basis of its protest at an even earlier date, from the face of the advertisement for the resale, the protester states it

(continued...)

It is not clear why Almanor's failure to execute the contract documents is distinguishable from the situations covered by the regulation, since it resulted in Almanor's not cutting timber under a properly awarded contract. However, we need not reach this question, since we find that the public interest exception applies here. The record indicates that the agency informally authorized the resolicitation of Almanor based on the need to secure adequate competition in the Sustained Yield Unit; were Almanor not permitted to compete, the competition could be limited to Big Valley, the only other bidder on the original sale. There is nothing in the regulation that requires a formal public interest determination, and we find no reason to read such a requirement into the regulation. Rather, it is our view that allowing Almanor to bid on the resale and accepting Almanor's offer for award represented an implicit determination that allowing Almanor to participate in the resale would be in the public interest. See Siller Bros., Inc. v. United States, 655 F.2d 1039, 1042 (Ct. Cl. 1981), cert. denied, 456 U.S. 925 (1982). Consequently, we find no impropriety in the conduct of the procurement by the agency.

The protest is denied.


James F. Hinchman
General Counsel

2/ (...continued)

believed the agency would follow the cited regulation which it believed prohibited resolicitation of Almanor; it was not until acceptance of Almanor's bid at bid opening that Big Valley realized this would not be the case. Under these circumstances, we are not convinced that the protester should have known the basis of its protest before bid opening. In any event, it is our practice to resolve doubts over when a protester first becomes aware of its basis for protest in the protester's favor for timeliness purposes. Med-National, Inc., B-232646, Jan. 12, 1989, 89-1 CPD ¶ 32.